Supreme Court, U.S.
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89-171
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ANTHONY DiCARLANTONIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ANTHONY DiCARLANTONIO
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Pro se

QUESTIONS PRESENTED

1. Whether the trial evidence constructively amended the Indictment by broadening the possible bases for conviction in violation of the Fifth Amendment to the United States Constitution?

2. Whether the admission of the co-defendant's post arrest statements deprived the petitioner of his right of confrontation in violation of the Sixth Amendment to the United States Constitution?

3. Whether petitioner's sentence was in violation of the Ex Post Facto Clause and the Due Process Clause of the United States Constitution by being in excess of that prescribed by the Comprehensive Crime Control Act of 1984?

THE PARTIES

John Prayso appeared as a defendant-appellant with petitioner, Anthony DiCarlantonio, in the United States Court of Appeals, Sixth Circuit, whose judgment is now being sought to be reviewed. The United States of America was the plaintiff-appellee.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit has been reported in volume 45 of the Criminal Law Reporter at page 2011 and in West's Federal Reporter cited as 870 F.2d 1058. Reprinted at A 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 17, 1989. Petitioner's conviction of a substantive violation of the Hobbs Act, 18 U.S.C. § 1951 was REVERSED and the verdict finding petitioner guilty of conspiracy to violate the Hobbs Act was AFFIRMED (A 11). The order denying a petition for rehearing and suggestion of rehearing en banc was denied on June 1, 1989 (A 12).

This court has jurisdiciton under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS

The Constitution of the United States, Article I, section 9, clause 3, reproduced at A 19.

The Constitution of the United States, Fifth Amendment, reproduced at A 19.

The Constitution of the United States, Sixth Amendment, reproduced at A 19.

STATUTES

18 U S.C. § 1951, reproduced at A 20.

18 U.S.C. § 3553 (b), reproduced at A 20.

18 U.S.C. § 4205 (a), reproduced at A 21.

28 U.S.C. § 1254 (1), reproduced at A 21.

STATEMENT OF THE CASE

The Grand Jury returned a two count Indictment against petitioner. Count one charged conspiracy and count two

charged a substantive violation of the Hobbs Act, 18 U.S.C. § 1951. (A13).

Petitioner was the Law Director for the City of Steubenville, Ohio and his co-defendant, John Prayso, was the Fire Chief. Respondent alleged that petitioner solicited a $15,000.00 fee from a propane gas distributor and agreed to change the existing local ordinance which prohibited propane gas sales withing the City limits of Steubenville.

The bribe money was provided from FBI funds, not the assets of the gas ditributor or his company.

The Grand Jurors specified in both counts of the Indictment that interstate commerce was affected by the "payment of $30,000.00 . . . from the propane gas distributor." No other kind of commerce was charged in the Indictment. (A 13).

On rebuttal and over specific defense objection, FBI agent Mark Chadichimo testified that the money received by the petitioner on May 28, 1986 belonged to the FBI and that interstate commerce was affected by a depletion of FBI funds. (Vol. VI, Jan. 14, 1988, Mark Chadichimo, Tr. 27). This charge and affect upon interstate commerce was not returned by the Grand Jury. (A 13).

The panel decision REVERSED petitioners conviction for the substantive violation of the Hobbs Act holding that the evidence at trial revealed that there was no actual impact or even a de minimus effect on interstate commerce (A 1). The conspiracy conviction was AFFIRMED.

Prior to trial, the district court found that several statements of co-defendant John Prayso tended to implicate petitioner. Rather than sever the trials as requested, the court permitted the respondent to redact any reference to petitioner from Prayso's statement. (A 17).

Three FBI agents testified to statements which co-

defendant Prayso made. With respect to the statements the Appeals Court stated that petitioner, "failed to challenge the incomplete redaction before the statements were admitted, as required by the trial court's order . . . even if this action by counsel is not deemed a waiver of any objection, in light of the evidence of appellant's guilt, any error was harmless." (A 1).

Petitioner was arrested on May 28, 1986. He was originally convicted and sentenced to twenty years in jail. The original convictions were reversed in the Sixth Circuit Court of Appeals and the case was remanded for a new trial.[1] Thereafter, on November 1, 1987, prior to petitioner's second trial, the sentencing guidelines of the Comprehensive Crime Control Act of 1984 became effective.

After re-trial, petitioner was sentenced to fifteen years on each of the two counts, to run concurrent, pursuant to 18 U.S.C. § 4205 (a), which makes him ineligible for parole release until he has served 60 months of incarceration. (A 21).

REASONS FOR GRANTING THE WRIT

ARGUMENT TO QUESTION NUMBER 1

A constructive amendment "occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecution or court after the grand jury has last passed upon the." *Gaither v. United States*, 413 F.2d 1061, 1071-72 (D.C. Cir. 1969).

Respondent introduced a totally new allegation at trial. FBI agent Mark Chadichimo testified that the money received by petitioner on May 28, 1986 belonged to the FBI

[1] The opinion of the court was unpublished and is cited as 830 F.2d 194. The conduct of the court required reversal.

and was wire transferred from FBI headquarters in Washington, D.C. to Steubenville, Ohio twenty-four hours earlier. In addition, agent Chadichimo testified that the FBI maintains offices in all 50 states and constantly involves itself in interstate activities. Finally, the agent testified that interstate commerce was affected by the $30,000.00 provided by the FBI because it "did in fact deplete or diminish the funds available to the FBI for that period of time." (Vol. VI, Jan. 14, 1988, Mark Chadichimo, Tr. 15-19). The Indictment did not charge a depletion of FBI assets nor the depletion of anyone elses assets. (A 13). This testimony resulted in a constructive amendment which unconstitutionally broadened the charges in the Indictment and violated petitioner's Fifth Amendment right to be tried only upon charges found by the Grand Jury. (A 13).

An amendment of the indictment is considered prejudicial per se and grounds for reversal of a conviction whether it is brought about by a literal alteration of the words of the indictment which broadens the charge, *United States v. Miller,* 471 U.S. 130 (1985); *Ex parte Bain,* 121 U.S. 1, 7 S.Ct. 781, 30 L. Ed. 849 (1887), a jury instruction which modifies the offense charged in the indictment, *Stirone v. United States,* 361 U.S. 212, 80 S.Ct. 270, 4 L. Ed. 2d 252, (1960), or the admission of evidence of an offense not charged by the grand jury, *United States v. Beeler,* 587 F.2d 340, (6th Cir. 1978), *cert. denied,* 454 U.S. 860, 102 S.Ct. 315, 70 L. Ed. 2d 158 (1981). For a valid Hobbs Act conviction, "it follows that when only one particular kind of commerce is charged to have been burdened, a conviction must rest on that charge and not another . . . " *Stirone supra,* at 218-219.

The panel decision did not specifically address the argument concerning the constructive amendment of the indictment but stated in a footnote that the reversal of the conviction for the substantive offense mooted the petitioner's claim that his Fifth Amendment rights had been

violated. (A 5).

"Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge . . . this was fatal error." *Stirone, supra,* at 218-219.

In *United States v. Beeler, supra,* the Sixth Circuit reversed a Hobbs Act violation where evidence establishing an illegal payment of money not charged in the indictment constituted a constructive amendment which could not be cured by jury instructions. In *United States v. Cusmano,* 659 F.2d 714 (6th Cir. 1981), both conspiracy to violate and a substantive violation of the Hobbs Act were reversed where the indictment alleged threats of economic loss and the evidence presented at trial was extortion by violence. The Sixth Circuit established a rule of automatic reversal when an essential element of a felony indictment is amended other than by grand jury action. *United States v. Pandilidis,* 524 F.2d 644, 648 (1976).

See also, United States v. Zingaro, 858 F.2d 94 (2nd Cir. 1988). The introduction of evidence of a loan that did not arise out of gambling activities as specified in the indictment was a constructive amendment of Rico Conspiracy. The court stated in *United States v. Kuna,* 760 F.2d 813, (7th Cir. 1985), that a constructive amendment occurs when the offense proved at trial was not fully contained in the indictment, for the trial evidence had amended the indictment by broadening the possible bases for conviction from that which appeared in the indictment.

In affirming the conspiracy conviction the circuit court stated that "a reasonable jury clearly could have found that petitioner had conspired to extort money from Glaub and Atlas Gas, and that, if successful, this scheme would have affected commerce by depleting the assets of an enterprise in

interstate commerce." (A 7). However based upon FBI agent Mark Chadichimo's testimony the jury would not have had to speculate. They would have found that interstate commerce was in fact effected by a depletion of FBI assets. This evidence was highly prejudicial. Throughout trial, petitioner relied on the indictment when examining witnesses concerning whether there was any effect on interstate commerce. During rebuttal, respondent was permitted to introduce an entirely new theory in order to prove an effect or (although not charged in the indictment) a reasonable probability of an effect on interstate commerce.

"The law requires that a verdict be set aside in a case where it is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. *United States v. Sales,* 725 F.2d 458, 459 (8th Cir. 1984); *see Yates v. United States,* 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed. 2d 1356 (1957)."

The decision returned by the federal court of appeals is in conflict with its own decisions, with the opinions of other federal courts and contrary to the opinions of the United States Supreme Court.

ARGUMENT TO QUESTION NUMBER TWO

The trial court permitted respondent to redact any reference to petitioner from co-defendant Prayso's statement in accordance with *Richardson v. Marsh,* 481 U.S. 200, 107 S.Ct. 1702 (April 21, 1987). Therefore the court found that severance was not required under *Briton v. United States,* 391 U.S. 123 (1968). Petitioner nor his co-defendant testified at trial. The Supreme Court held that a defendant is deprived of his rights under the Confrontation Clause when his nontestifying co-defendant's confession naming him as a participant in the crime is introduced at their joint trial.

At trial, FBI agent Clayton Lemme testified, over objection, that he identified himself as an FBI special agent

and arrested Chief Prayso when he exited petitioner's office on May 28, 1986. When placed under arrest, Chief Prayso questioned why the FBI was present by stating "what are you doing here?" (Vol. III, Jan. 11, 1988, Clayton Lemme, Tr. 155). Subsequently, FBI agent Robert Laukert testified, over objection, that Chief Prayso was taken to FBI headquarters where he was advised of his rights, waived his rights and furnished a statement. Chief Prayso stated that he had received a telephone call from attorney Otto Jack during which he told Jack that propane tanks were not allowed in Steubenville. Chief Prayso stated that he attended one meeting with Jack, Glaub and DiCarlantonio to discuss the matter further. (Vol. III, Jan. 11, 1988, Robert Laukert, Tr. 194-95, 199-200). Agent Laukert testified that Prayso related:

> They (Prayso, Glaub, Jack and DiCarlantonio) discussed the ordinance with regard to propane tanks within the city. They discussed the fact that the ordinance, in order for it to be changed, had to be before the city council. Then the matter of money came up, and Chief Prayso advised that he mentioned a figure of $30,000.00 which would be acceptable in connection with the changing.
>
> After this meeting -- at this meeting, I should say, there was discussion concerning another meeting which was to be held in the future, but no date was set at that time. He indicated that this was the only meeting that he had with Jody Glaub and Otto Jack concerning the ordinance. (Vol. III, Jan. 11, 1988, Robert Laukert, Tr. 200-201). (Emphasis added).

Laukert then testified that Chief Prayso stated that he (Prayso) met with Ed Wilson and Michael Dieguez regarding a possible change of the propane gas ordinance. Chief Prayso then explained what took place at the May 28, 1986 meeting:

On May 28 he went to the law director's office and he met with Jody Glaub and the law director, and at the time he received the sum of $15,000.00 in cash which he placed in his stockings, and then left the office and went down to the office of Mr. Wilson, which is in the same building on the same floor, for the purpose of discussing with Mr. Wilson a meeting they were going to have that afternoon out at a location on Lovers Lane, a rest home, where they were going to talk to the owner of the rest home regarding some property the owner had in the area which had a weed control problem. In the same afternoon, he was going to go with Mr. Wilson to look at some dilapidated housing within the city of Steubenville. That is all he related.

Q: Did he indicate what he was going to do after he looked at these weeds and this dilapidated housing?

Yes, after the meeting was completed with Mr. Wilson, he was going to go home, eat his lunch and contact the FBI this date and provide them with information concerning the matter concerning the possession of this $15,000.00.

Q: What did he say specifically about the $15,000.00?

After his lunch he was going to come to our office and provide information to the FBI regarding how he acquired the $15,000.00 that he received that day that was in his possession when he was frisked. (Vol. III, Jan. 11, 1988, Robert Laukert, Tr.201-204).

Subsequently, FBI agent Rodney Wilson testified for the respondent that he was present when FBI agent Tomasso

subsequently interrogated Chief Prayso. Tomasso asked Prayso when he intended to come to the FBI to report what had taken place in the petitioner's office. Agent Wilson testified:

> His (Prayso) response was that he had an appointment with the city building inspector that morning and then he was going to go by his house and have lunch, and then in the early afternoon he was going to come down to the FBI office and show us the money.
>
> Q: Did he tell you how he was going to show you the money?
>
> Yes, he said he hiked up his pants like this and said he was going to show us the money, like the money was in his socks.
>
> Q: He actually pulled up his pants like that for you?
>
> Yes, to indicate that is how he was going to show it to us.
>
> Q: Did agent Tomasso ask him another question?
>
> Yes, he also asked him how the FBI was expected to conduct an investigation after eveything was done.
>
> Q: What did he say?
>
> He said that was the FBI's job, that he didn't know how to do the investigation.[2] (Vol. IV, Jan. 12, 1988, Rodney Wilson, Tr.5-8).

The defense of both Chief Prayso and petitioner was that they were conducting their own, joint investigation of a

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[2] A cautionary instruction was given to the jury at the conclusion of agent Wilson's testimony, (Jan. 12, 1988, Tr.51, App.), and in the court's charge to the jury. (Jan. 14, 1988, Tr.184-85, App.).

bribery solicitation by Otto Jack and Jody Glaub. Throughout closing argument, respondent acknowledged the joint defense and vigorously attempted to undermine the joint defense. The defendants would both be acquitted or they would both be convicted. An attack on the credibility of one was an attack on the credibility of the other. In attacking the credibility of petitioner's defense, extensive reference was made concerning Prayso's out-of-court statements:

> This case is about two men . . . who saw an opportunity to make some easy money by selling their influence. They saw an opportunity to make some money and they seized upon it. It is a sad but true case, and you have seen in this courtroom a shocking attempt by the defense to pervert the system even more by attempting to show that they were doing their own investigation. (Vol. VI, Jan. 14, 1988, Tr.74) (Emphasis added).

Subsequently, Chief Prayso's post-arrest statements were used to ridicule the joint defense. Respondent argued:

> The money had been split 50-50 and the money was leaving. And John Prayso told the FBI three to five minutes later when he got down in the interview room at the FBI office, which was a block and-a-half, two blocks away, he said well, I was planning on meeting with Wilson, going out and inspecting some weeds, looking at a dilapidated building and then I was going home, have a little lunch and then come down and see the FBI, and go like this. And show them the money. And the FBI said how are we supposed to know where it came from? And he said you are the investigators. He brought them $15,000.00. Where was the other $15,000.00? Well, we know where that was. We found it . . . from the time John Prayso left DiCarlantonio's office, two

> minutes later Anthony DiCarlantonio comes out. (Vol. VI, Jan. 14, 1988, Tr.96-97).

During rebuttal, respondent again ridiculed petitioner's defense by highlighting Prayso's statements and commenting on Prayso's failure to testify at trial and elaborated on his investigative activities.

> The money was split, John Prayso went his way, Anthony DiCarlantonio put his money in a locked briefcase, and in fact Prayso indicated that he was going to come down and see the FBI later. He said that in his statement, but I guess the FBI agents were lying when they heard him say that . . . John Prayso, something about his statement was wrong but there was no explanation for what they were in error on . . . (Vol. VI, Jan. 14, 1988, Tr.164-65).

Finally at the end of rebuttal, Prayso's statements were again used to undermine petitioner's defense.

> Prayso is arrested with the money in his socks and when confronted wants to know what it is about. Prayso told the FBI that he was going to take the $15,000.00 after lunch and come down and see the FBI. They were doing their own investigation, yet he has got 15. Where is the other 15? (Vol. VI, Jan. 14, 1988, Tr.174-175).

The introduction of Prayso's statements clearly implicated petitioner. Prayso's statements told the jury that everything took place in the petitioner's office. Prayso's statements constituted specific testimony that "the defendant helped me to commit the crime," *see, Richardson v. Marsh, supra,* at 1707.

Petitioner's case clearly is governed by *Cruz v. New York,* 481 U.S. 186, 107 S.Ct. 1714 (1987). As stated in Cruz at 1719:

> We held that, where a nontestifying co-defendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him. *Id.*, at 1719. (Citations omitted).

When the prosecution attempts to redact co-defendants' statements in a manner not violative of *Bruton, supra,* the prosecution bears the burden of proving that a praticular confession will not be powerfully incriminating. The respondent is responsible for effective redaction because it created the dilemma by resisting severance.

It was "plain error" to permit the above mentioned statements into evidence as they unconstitutionally contributed to petitioner's conviction. The cumulation of the statements adversely influenced the jury. Introduction of the statements was not harmless beyond a reasonable doubt but rather "plain error."

ARGUMENT TO QUESTION NUMBER THREE

On November 1, 1987, prior to petitiner's trial, the sentencing guidelines of the Comprehensive Crime Control Act of 1984 became effective. 18 U.S.C. § 3553 (b) provides:

> (b) Application of guidelines in imposing a sentence. The court shall impose a sentence of the kind, and within the range, referred to in subsection (a) (4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described. In the absence of an

> applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a) (2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by the guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

The presentence report did not address the applicability of the guidelines to petitioner's convictions, nor did the court sentence pursuant to the guidelines.

Petitioner was sentenced to fifteen years pursuant to 18 U.S.C. § 4205 (a) which provides that petitioner is eligible for release on parole after serving one-third of his sentence. Under this sentence, petitioner is ineligible for parole until he has served 60 months of incarceration. This sentence, in violation of the guidelines, must be modified. The applicable sentencing statutes, all effective November 1, 1987 and prior to petitioner's second trial, specify that the Court shall sentence pursuant to the guidelines. There is nothing in any of the statutes referring to the sentencing guidelines, nor in the guidelines themselves, nor in any of the materials promulgated by the Sentencing Commission which would preclude the application of the guidelines to conduct which occurred prior to November 1, 1987 when the sentencing occurs after the effective date of the legislation.

In this case, there is no constitutional prohibition to applying the guidelines to conduct occurring prior to November 1, 1987. Article I of the United States Constitution provides that neither congress nor any State shall pass any "ex post facto Law." *See,* Art. I, section 9, cl. 3; Art. I, section 10, cl. 1. In *Calder v. Bull,* 3 Dall. 386 (1798),

the Supreme Court first considered the scope of the *ex post facto* clause and summarized its understanding of what fell "within the words and the intent of the prohibition:"

> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and recieves less, or different testimony than the law required at the time of the commission of the offence, in order to convict the offender. *Id.*

In *Miller v. Florida*, 482 U.S. 351, 107 S.Ct. 2446 (1987), Justice O'Connor, speaking for a unanimous Court, further defined the test for determining whether a law is *ex post facto* or not.

> Our test for determining whether a criminal law is *ex post facto* derives from these principles. As was stated in *Weaver*, to fall within the *ex post facto* prohibition, two critical elements must be present: first, the law "must be retrospective, that is, it must apply to events occurring before its enactment;" and second, "it must disadvantage the offender affected by it." *Id.* at 29. We have also held in *Dobbert v. Florida*, 432 U.S. 282, that no *ex post facto* violation occurs if a change does not alter "substantial personal rights," but merely changes "modes of procedure which do not affect matters of substance." *Id.*, at 293. See *Beazell v. Ohio*, 269 U.S. 167 (1925).

Application of the guidelines in petitioner's case would clearly be retrospective insofar as sentencing criteria, which

did not exist at the time of petitioner's acts, would be mandatorily applicable to his sentencing for those acts. However, "it is axiomatic that for a law to be *ex post facto*, it must be more onerous that the prior law." *Dobbert v. Florida, supra* at 294. In petitioner's case, the sentence rendered is more onerous than that specified by the Sentencing Commission in the guidelines. Thus, there is no constitutional limitation to the applicability of the sentencing guidelines to petitioner.

In addition, the guidelines of the Sentencing Commission, as applied to petitioner, are procedural and ameliorative. *See, Dobbert v. Florida, supra,* at 294. The Sentencing Commission Guidelines, Chapter One, Part A, Introduction, 3. *The Basic Approach* (Policy Statement) explains the purpose of the guidelines:

> To understand these guidelines and the rationale that underlies them, one must begin with three objectives that Congress, in enacting the new sentencing law, sought to achieve. Its basic objective was to enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system. To achieve this objective, Congress first sought *honesty* in sentencing . . . Second, Congress sought *uniformity* in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. Third, Congress sought *proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity. (Emphasis in original).

Thus, the guidelines where promulgated to correct what Congress preceived as flaws in the prior system of sentencing. These flaws were of arbitraty and discriminatory sentencing of similarly situated defendants as well as the inability of

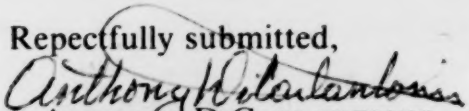
the prior sentencing provisions to ensure proportionality between different offenders and crimes of different seriousness. The guidelines became effective and mandatory during the pendency of petitioner's case and, in effect, constituted the penalty prescribed for the acts at the time these acts were committed. The district court did not possess the discretion to render a sentence in excess of the guidelines.

The Sentencing Guidelines can operate retrospectively because the guidelines serve to mitigate and ameliorate the rigor of the law in force at the time the crime was committed. *Re Medley,* 134 U.S. 160 (1890); *Rooney v. North Dakota,* 196 U.S. 319 (1905). In determining whether punishment permitted by Public Law 100-182 is more onerous than that in effect prior to its enactment, the Supreme Court compares the "practical operation" of the two statutes as applied to the offense. *Lindsey v. Washington,* 301 U.S. 397 (1937). If the December 7, 1987 enactment made it possible for petitioner to receive a greater punishment, even though it was also possible for him to receive the same punishment under the new law as could have been imposed under the prior law, the enactment violated due process of law and Art. I, Section 9 of the United States Constitution. *Id.*

CONCLUSION

For the above reasons a writ of certiorari should be issued to review the judgment and opinion of the Sixth Circuit.

Repectfully submitted,



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APPENDIX

A 1

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Appeal Nos. 88-3151/52 & 88-3248/49

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

ANTHONY DICARLANTONIO (88-3151/3248), and JOHN PRAYSO (88-3152/3249),
Defendants-Appellants.

ON APPEAL from the United States Distict Court for the Southern District of Ohio.

Decided and Filed March 17, 1989

Before: KENNEDY and MILBURN, Circuit Judges; and PECK Senior Circuit Judge.

KENNEDY, Circuit Judge. Anthony DiCarlantonio and John Prayso appeal their convictions for conspiracy to violate and actual violation of the Hobbs Act, 18 U.S.C. § 1951. We affirm the conspiracy convictions; but we reverse appellants' convictions for substantive Hobbs Act violations, because the government failed to prove appellants' actions had an effect on interstate commerce.

DiCarlantonio was city attorney of Steubenville, Ohio; Prayso the fire chief. In May 1986, attorney Otto Jack sought DiCarlantonio's interpretation of a local fire ordinance which apparently prevented Jack's client—Jody Glaub—from placing propane tanks within the city limits. Prayso had previously ordered the removal of tanks owned by Glaub's

company, Atlas Gas. DiCarlantonio told Jack he would discuss the situation with Prayso.

On May 12, 1986, Jack telephoned DiCarlantonio to check on his progress. DiCarlantonio suggested that Jack give money to the fire chief. Jack balked at the suggestion, protesting that a payoff would be illegal. During this telephone conversation, it was agreed that DiCarlantonio, Prayso, and Jack would meet the following day. At the May 13 meeting, Prayso observed that Glaub could "make a fortune" in the propane business, and said "We should all be on a percentage." Jack reiterated his objection that a kickback would be illegal. The three ultimately decided to reconvene the next day with Glaub in attendance.

Following the May 13 meeting, Glaub and Jack arranged to cooperate with the FBI. On May 14, DiCarlantonio and Prayso promised Glaub a "very reasonable" deal. It was agreed that Glaub would calculate his anticipated profit if the ordinance were changed, and DiCarlantonio and Prayso would receive a cut. On May 20, 1986, DiCarlantonio and Prayso agreed to a $30,000 "fee" for working to change the ordinance. They immediately began lobbying local officials in favor of altering the ordinance, but these efforts did not result in a change in the law.

On May 28, 1986, Glaub delivered $30,000 to DiCarlantonio and Prayso. The bribe money was provided from FBI funds, not the assets of Jody Glaub or Atlas Gas. Prayso was apprehended the same day with $15,000 stuffed in his socks. DiCarlantonio had a briefcase in his possession when arrested. When questioned by the FBI, DiCarlantonio claimed he did not have the key to the case. Confronted with the fact that the case had a combination lock, he replied that the combination was 1-3-3 and warned that the lock "sticks." Subsequent examination revealed that the combination was 2-2-4 and that the mechanism worked smoothly. The FBI

obtained a search warrant, and the case was opened in the presence of DiCarlantonio and his attorney, revealing $15,000 in cash. DiCarlantonio exclaimed, "Oh, how did that get there?"

Prayso and DiCarlantonio claimed that they had been privately investigating Glaub. Unimpressed by this explanation, the jury convicted both defendants. The convictions were reversed on appeal, but after a second trial both were again convicted.

I.

The principal issue raised by this appeal is whether appellants' conduct constituted a substantive Hobbs Act violation. The Act punishes extortion that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951. Appellants contend the government failed to prove that their scheme had any actual impact on interstate commerce. They point out that the flow of natural gas into Steubenville was stemmed not by their illegal acts, but by a preexisting valid ordinance. As for the payment of the bribe, appellants argue this had no effect on interstate commerce because the money came from the FBI, not Atlas Gas.

In order to be punishable as a substantive violation of the Hobbs Act, an extortionate scheme must have at least a *de minimis* effect on interstate commerce. *United States v. Harding, 563* F.2d 299 (6th Cir. 1977), *cert, denied,* 434 U.S. 1062 (1978). This is not a heavy burden, but we conclude that this is one of the rare cases where a de minimus effect on commerce cannot be found.

The *de minimis* test clearly would have been satisfied if Glaub had paid the bribe with the assets of Atlas Gas—a business in interstate commerce. However, Glaub used neither his own funds nor those of the company; instead, the bribe money was provided by the FBI. The government now

argues that the payment of $30,000 in FBI funds affected interstate commerce by temporarily depleting the funds available to the agency. But while courts have found actual violations of the Hobbs Act where the defendant dealt with an FBI-created business,[1] the mere receipt of government funds has never been enough to establish an actual effect on interstate commerce. In *United States v. Rindone,* the Seventh Circuit held that although receipt of FBI funds was sufficient to establish Hobbs Act jurisdiction for purposes of an attempt charge, "the extortion could not at the moment of the payoff have actually affected commerce." 631 F.2d 491, 494 (7th Cir. 1980). This reasoning assumed that the receipt of FBI funds as a bribe had no impact on interstate commerce, and "the corollary of the *Rindone* analysis is that no actual *commission* of Hobbs Act extortion could be charged for the receipt of what were in fact FBI funds." *United States vs. Freedman,* 562 F. Supp. 1378, 1383 (N.D. Ill. 1983) (emphasis in original). *Freedman* observed:

> [T]here could be no actual effect on interstate commerce when Rindone obtained FBI dollars, not dollars belonging to interstate interpriser Harper. Thus only the possibility of convicting Rindone for an extortion *attempt* under the Hobbs Act obviated the government's need to show an actual effect on interstate commerce. . . .

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[1]*See, e.g., United States v. Frasch,* 818 F.2d 631, 634-35 (7th Cir. 1987) (sufficient nexus with interstate commerce where sham FBI interprise was a purchaser of goods in interstate commerce). *Cf. United States v. Brantley,* 777 F.2d 159, 161-63 (4th Cir. 1985), *cert. denied,* 479 U.S. 822 (1986) (mere movement of agents and equipment insufficient nexus to interstate commerce where sham FBI operation had no interstate commercial transactions).

Id. at 1383 (emphasis in original). *See also Brantley*, 777 F.2d at 163 ("[W]e do not think the convictions of the substantive offenses [under the Hobbs Act] may be sustained on the basis of the defendants' mistaken assumption that commerce would be affected.").

The government protests that adopting the *Rindone* analysis would hamper law enforcement by requiring victims to use their own money even when cooperating with the authorities. However, we note that *Rindone* erects no barrier to attempt charges where FBI funds are used, and an attempted violation of the Hobbs Act carries the same potential penalties as a completed one.[2]

Alternatively, the government suggests that the scheme affected interstate commerce by restricting the flow of propane gas. But, in fact, appellants' actions had no effect on the amount of gas permitted in Steubenville. Commerce in propane was limited not by appellants' actions, but by a valid municipal ordinance, which had been enacted before Prayso became fire chief and DiCarlantonio law director. Nor did appellants succeed in increasing the flow of gas. Of course, the success of an extortionate scheme is not ordinarily a prerequisite to a substantive Hobbs Act violation. But in this case, appellants' failure to carry out the objects of the scheme meant that interstate commerce was in no way affected by the scheme. It did not take any funds out of the stream of commerce, nor did it increase or decrease the flow of propane.

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[2]Appellants contend the District Court erred in permitting FBI Agent Chadichimo to testify to the interstate character of the FBI. They assert that this testimony was improper because it permitted the jury to convict on the legally infirm theory that depletion of FBI funds constitutes obstruction of interstate commerce. Since we reverse appellants' convictions for substantive Hobbs Act violations, this is a moot issue.

II.

Appellants argue that their convictions for conspiracy to violate the Hobbs Act also must be reversed, because it became impossible to complete the violation once the FBI became involved. This argument misapprehends the law of conspiracy. While a substantive Hobbs Act violation requires an actual effect on interstate commerce, a conspiracy charge requires the government to prove only that the defendants' scheme would have affected commerce. "As with other conspiracies, a conviction of conspiring to obstruct commerce in violation of the Hobbs Act may be founded upon proof of an agreement to engage in conduct which would violate the statute." *United States v. Brantley*, 777 F.2d 159, 163 (4th Cir. 1985), *cert. denied*, 479 U.S. 822 (1986). Thus, the courts have concluded that "factual impossibility is no defense to an inchoate offense" under the Hobbs Act. *United States v. Brooklier*, 685 F.2d 1208, 1217 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983). In *Brooklier*, for example, the defendants challenged their Hobbs Act conspiracy convictions on the ground that the business involved had no nexus with interstate commerce because it was an FBI sham. The court rejected this defense, holding that no actual impact on interstate commerce need be shown to sustain a conspiracy conviction. Similarly, the Third Circuit, sitting *en banc*, upheld the Hobbs Act conspiracy convictions of government officials who accepted substantial payments from a fictitious "Arab Shiek," even though the transaction had no actual effect on interstate commerce. *United States v. Jannotti*, 673 F.2d 578 (3rd Circuit) (*en banc*), *cert. denied*, 457 U.S. 1106 (1982). The court observed:

> The Hobbs Act, by its own terms, encompasses the inchoate offenses of attempt and conspiracy to extort. Convictions for these offenses have been

> sustained notwithstanding the absence of any evidence of an actual effect on interstate commerce.

Id. at 592.

In the present case, a reasonable jury clearly could have found that appellants had conspired to extort money from Glaub and Atlas Gas, and that, if successful, this scheme would have affected commerce by depleting the assets of an enterprise in interstate commerce. Accordingly, the appellants' convictions of conspiracy to violate the Hobbs Act are affirmed.

III.

Appellant DiCarlantonio asserts that his sixth ammendment right to confrontation was violated by the admission of statements by codefendant Prayso. *Bruton v. United States,* 391 U.S. 123 (1968) held that a defendant's right to confrontation is violated when his nontestifying codefendant's confession implicating him is admited at a joint trial. The Supreme Court recently held that *Bruton* does not bar the use of a codefendant's confession if it is redacted to omit any references to the defendant's name or existence, even if the codefendant's confession becomes incriminating when linked with other evidence adduced at trial. *Richardson v. Marsh,* 481 U.S. 200 (1987).

In the present case, Prayso's confession was redacted to exclude statements which clearly incriminated DiCarlantonio. The trial court denied severance based on the redaction, and ordered counsel to "request a conference at the bench immediately prior to testimony concerning defendant Prayso's post-arrest statement to assure that all the necessary redactions have been made."

While Prayso's confession was redacted to eliminate any direct references to illegal acts by DiCarlantonio, it was not redacted to eliminate "any reference to [his] existence."

Marsh, 481 U.S. at 200. Prayso's statement indicated that the bribery took place in the law director's office and that the law director (DiCarlantonio) was present at the time. Prayso's redacted confession identified DiCarlantonio by name as the law director. Finally, the statement also revealed that while a bribe of $30,000 was agreed upon, Prayso took only $15,000. The statements appear to incriminate DiCarlantonio without linkage to any other evidence. Moreover, the redaction did not exclude mention of DiCarlantonio's name and existence, as *Marsh* appears to require.

However, DiCarlantonio failed to challenge the incomplete redaction before the statements were admitted, as required by the trial court's order. Indeed, the most damaging portion of the confession—which named DiCarlantonio and placed him in the office at the time the $30,000 was solicited—was admitted after DiCarlantonio's counsel stated in a bench conference that he did not consider it improper. Even if this action by counsel is not deemed a waiver of any objection, in light of the strength of the evidence of appellant's guilt, any error was harmless. *See Schneble v. Florida*, 405 U.S. 427, 430 (1972) ("The mere finding of a violation of the *Bruton* rule . . . does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect . . . so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.").

Prayso also raises a *Bruton* issue. He asserts the District Court erred in admitting DiCarlantonio's out-of-court statements concerning the briefcase and its contents. However, these statements did not even hint at Prayso's existence. They were incriminating as to Prayso only when linked with other evidence. Therefore, the admission of DiCarlantonio's statements does not present a *Bruton* problem.

IV.

On rebuttal, Agent Chadichimo testified that he took DiCarlantonio's briefcase to a locksmith for examination. The locksmith told Chadichimo that the combination to the lock was 2-2-4, not 1-3-3 as DiCarlantonio first told the authorities. Chadichimo also testified that the locksmith found that the lock did not stick when the combination 2-2-4 was used. DiCarlantonio argues that this testimony was admitted in violation of Fed. R. Crim. P. 16, because the results of the locksmith's tests were not revealed to the defendants before trial.

Rule 16 requires the government to disclose the results of tests "intended for use by the government as evidence in chief." Agent Chadichimo's testimony was not part of the government's case in chief; it was offered to rebut defense testimony by Mrs. DiCarlantonio in support of her husband's claim that the lock "sticks." "Rebuttal witnesses are a recognized exception to all witness disclosure requirements." *United States v. Windham*, 489 F.2d 1389, 1392 (5th Cir. 1974). Therefore, the District Court did not err in allowing Agent Chadichimo's testimony.

V.

Agent Chadichimo testified that when DiCarlantonio's briefcase was pried open to reveal the $15,000, DiCarlantonio cried "Oh, how did that get there?" DiCarlantonio had been permitted to confer with his attorney subsequent to his arrest, and his attorney was present when the statement was made.[3] He now argues that the trial court erred in not ordering a hearing to determine whether he had been advised of his *Miranda* rights and whether he had voluntarily waived

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[3] Defense counsel did not contest U.S. Attorney's representation to the trial judge that DiCarlantonio had been informed of his rights.

those rights in making the statement, even though he neither requested such a hearing at trial nor moved to suppress the statements before trial as required by Fed. R. Crim. P. 12 (b)(3).

Counsel should have raised any objection to this evidence in a pretrial motion to suppress under Rule 12. Appellants' failure to make such a motion constitutes a waiver of any objection. Fed. R. Crim. P. 12(f). *See, e.g., United States v. Ostertag,* 619 F.2d 767, 771 (8th Cir. 1980). Moreover, even assuming this evidence should have been excluded, the error was harmless in light of the strong evidence of DiCarlantonio's guilt.

VI.

Appellants' remaining assignments of error are without merit.

The verdicts finding appellants guilty of conspiracy to violate the Hobbs Act are AFFIRMED. Appellants' convictions for completed Hobbs Act violations are REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appeal Nos. 88-3151/3152 & 88-3248/3249

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY DiCARLANTONIO (88-3151/3248),
JOHN PRAYSO (88-3152/3249),

Defendants-Appellants.

CR-2-86-66-1
Judge Graham

Before: KENNEDY and MILBURN, Circuit Judges; and PECK, Senior Circuit Judge.

JUDGEMENT

ON APPEAL from the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here *ORDERED AND ADJUGED* by this court that the verdicts finding appellants guilty of conspiracy to violate the Hobbs Act are *AFFIRMED.* Appellants' convictions for completed Hobbs Act violations are *REVERSED.*

No costs taxed.

ENTERED BY ORDER
OF THE COURT
/s/ Leonard Green
Clerk

DATE: March 17, 1989

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appeal Nos. 88-3151/3248 & 88-3152/3249

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY DiCARLANTONIO,
JOHN PRAYSO,
Defendants-Appellants.

ORDER

Before: KENNEDY and MILBURN, Circuit Judges; and PECK, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewd the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT
/s/ Leonard Green
Clerk

DATED AND FILED June 1, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. CR-2-86-066

UNITED STATES OF AMERICA

v.

ANTHONY DiCARLANTONIO,
JOHN PRAYSO

INDICTMENT

THE GRAND JURY CHARGES:

COUNT 1

1. Beginning on or about May 12, 1986, and continuing through May 28, 1986, within the Southern District of Ohio, defendants ANTHONY DiCARLANTONIO, Law Director of the City of Steubenville, Ohio and JOHN PRAYSO, Fire Chief of the City of Steubenville, Ohio did unlawfully, wilfully, knowingly, and intentionally conspire, combine, confederate and agree together and with each other to obstruct, delay or affect commerce and the movement of articles and commodities in commerce by extortion, as the terms commerce and extortion are defined in Title 18, United States Code, Section 1951, in that ANTHONY DiCARLANTONIO and JOHN PRAYSO did unlawfully, wilfully and intentionally conspire, combine, confederate, and agree together and with each other to unlawfully obtain money by the wrongful use of fear of economic loss and under color of official right from and with the consent of a person who sought authority to distribute propane gas

within the city of Steubenville, Ohio, which money was not due the defendants or their office, and to which money the defendants were not entitled in that the defendants obtained said money by virtue of their respective offices of Law Director and Fire Chief.

2. At all times material to this Indictment, ANTHONY DiCARLANTONIO was serving as the Law Director for the city of Steubenville, Ohio.

3. At all times material to this Indictment, JOHN PRAYSO was serving as the Fire Chief for the city of Steubenville, Ohio.

The foregoing objects of the conspiracy were accomplished in substance as follows.

4. It was part of the conspiracy that ANTHONY DiCARLANTONIO and JOHN PRAYSO would support a request by a propane gas distributor to distribute propane gas in the city of Steubenville, Ohio, if the propane gas distributor would make a cash payment of $30,000 to ANTHONY DiCARLANTONIO and JOHN PRAYSO.

5. It was a further part of the conspiracy that ANTHONY DiCARLANTONIO and JOHN PRAYSO, in exchange for the payment of $30,000, by the propane gas distributor, would take steps necessary to insure that the propane gas distributor would be allowed to distribute propane gas in the city of Steubenville, Ohio.

6. It was a further part of the conspiracy that ANTHONY DiCARLANTONIO and JOHN PRAYSO in exchange for the payment of $30,000 would, among other things, attempt to procure an amendment to the existing city ordinance to clarify the legality of the use of propane gas within the city limits of Steubenville, Ohio.

7. The Grand Jury further charges that the defendants in furtherance of and to effect the unlawful goal of the

conspiracy, did commit, among others, the following overt acts:

a. On or about May 14, 1986, ANTHONY DiCARLANTONIO and JOHN PRAYSO met with a propane gas distributor in the offices of ANTHONY DiCARLANTONIO.

b. On or about May 20, 1986, ANTHONY DiCARLANTONIO and JOHN PRAYSO again met with a propane gas distributor in the offices of ANTHONY DiCARLANTONIO at which time ANTHONY DiCARLANTONIO and JOHN PRAYSO requested a payment of $30,000 cash, $15,000 for each, from the propane gas distributor in return for their assistance in securing the right to distribute propane gas within the city limits of Steubenville, Ohio.

c. On or about May 20, 1986, ANTHONY DiCARLANTONIO and JOHN PRAYSO attended a meeting of the Steubenville city department heads at which time ANTHONY DiCARLANTONIO and JOHN PRAYSO urged the Steubenville department heads to consider amending the existing ordinance concerning propane gas use within the Steubenville city limits.

d. Beginning on or about May 20, 1986, ANTHONY DiCARLANTONIO, in his efforts to redraft the city ordinance concerning the use of propane gas, attempted to obtain sample legislation.

e. On or about May 27, 1986, ANTHONY DiCARLANTONIO arranged to meet with the propane gas distributor and JOHN PRAYSO in his office on the following morning at 10:30 a.m.

f. On or about May 28, 1986, at approximately 10:30 a.m., ANTHONY DiCARLANTONIO and JOHN PRAYSO met with the propane gas distributor in ANTHONY DiCARLANTONIO'S office at which time

ANTHONY DiCARLANTONIO and JOHN PRAYSO each accepted $15,000 cash from the propane gas distributor.

g. On or about May 28, 1986, at approximately 10:45 a.m., JOHN PRAYSO left ANTHONY DiCARLANTONIO'S office with $15,000 concealed in his socks.

h. On or about May 28, 1986, at approximately 10:45 a.m., ANTHONY DiCARLANTONIO possessed $15,000 in his locked briefcase located in his office.

In violation of 18 U.S.C. §1951.

COUNT 2

Beginning on or about May 12, 1986, and continuing through May 28, 1986, within the Southern District of Ohio, the defendants, ANTHONY DiCARLANTONIO, Law Director of the City of Steubenville, Ohio, and JOHN PRAYSO, Fire Chief of the City of Steubenville, Ohio did knowingly, wilfully and unlawfully obstruct, delay or effect commerce and the movement of articles and commodities in commerce by extortion as the terms commerce and extortion are defined in Title 18, U.S.C. Section 1951, in that ANTHONY DiCARLANTONIO and JOHN PRAYSO did unlawfully obtain by the wrongful use of fear of economic loss and under color of official right money, to wit $30,000, from and with the consent of a person who sought authority to distribute propane gas, which money was not due the defendants or their office, and to which money the defendants were not entitled, in that the defendants obtained said money by virtue of their respective offices of City Law Director and Steubenville City Fire Chief.

In violation of Title 18, U.S.C. 1951.

DATED June 20, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR2-86-66 (1) and (2)

United States of America,

Plaintiff,

v.

Anthony DiCarlantonio
John Prayso,

Defendants.

JUDGE GRAHAM

ORDER

Defendant DiCarlantonio has filed a motion to sever his trial from that of co-defendant Prayso. While defendant Prayso has not filed a written motion for severance, his counsel stated that he would join in that motion at the oral hearing on the motion. Defendants argue that a joint trial would created problems under *Bruton v. United States,* 391 U.S. 123 (1968), in that the government's evidence would include statements of the defendants offered as statements of co-conspirators under Fed. R. Evid. 801(d)(2)(E) as well as post arrest statements.

With regard to any statements which fall within the scope of Rule 801(d)(2)(E), no problem under the Confrontation Clause is present and severance is not required under *Bruton v. United States, supra. See, Bourjaily v. United States,* 55

U.S.L.W. 4962 (June 23, 1987). The proffer of the government and the transcript of the prior trial indicate that the government can prove the existence of a conspiracy by a preponderance of the evidence as a foundation for the admissibility of co-conspirator's statements.

Defendant DiCarlantonio also points to testimony in the former trial which relates post-arrest statements made by defendant Prayso. (Transcript of prior trial, pp. 328-334). Defendant Prayso referred to defendant DiCarlantonio several times while talking with government agents. The Court finds that several of these statements, including defendant Prayso's comment about investigating DiCarlantonio, tend to implicate DiCarlantonio in criminal activity, and that such evidence would not be admissible as part of the government's case in chief in the joint trial of the defendants. However, the government has indicated a willingness to redact any reference to DiCarlantonio from Prayso's statement in accordance with *Richardson v. Marsh,* 55 U.S.L.W. 4509 (April 21, 1987). The Court therefore finds that severance is not required under *Bruton v. United States, supra.* Counsel should request a conference at the bench immediately prior to testimony concerning defendant Prayso's post-arrest statement to assure that all the necessary redactions have been made.

Defendants' motion for severance is DENIED.

JAMES L. GRAHAM
United States District Judge

DATE: January 4, 1988

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States, Article I, § 9, Clause 3.

Bills of Attainder and Ex post Facto Laws

No Bill of Attainder of ex post factor Law shall be passed.

The Constitution of the United States, Fifth Amendment.

Grand Jury Indictment for Capital Crimes

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Constitution Of The United States, Sixth Amendment.

Jury trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTES

18 U.S.C. § 1951 (a).

INTERFERENCE WITH COMMERCE BY THREATS OR VIOLENCE

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000.00 or imprisoned not more than twenty years, or both.

18 U.S.C. § 3553 (b),

APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE

The court shall impose a sentence of the kind, and within the range, referred to in a subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence

imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 U.S.C. § 4205 (a),

TIME OF ELIGIBILITY FOR RELEASE ON PAROLE

Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

28 U.S.C. § 1254 (1),

CERTIORARI

Cases in the courts of appeals may be reviewd by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2)

Nos. 89-171 and 89-5641

Supreme Court, U.S.
FILED
OCT 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

ANTHONY DICARLANTONIO, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN PRAYSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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EDWARD S.G. DENNIS, JR.
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14pp

QUESTIONS PRESENTED

1. Whether proof that money paid to petitioners was furnished by the FBI constructively amended the charge of conspiracy to violate the Hobbs Act, 18 U.S.C. 1951.

2. Whether the admission of petitioner Prayso's post-arrest statements was harmless error with regard to petitioner DiCarlantonio.

3. Whether petitioners were entitled to be sentenced under the current sentencing guidelines even though their offenses occurred before the effective date of the guidelines.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-171

ANTHONY DICARLANTONIO, PETITIONER

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v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 870 F.2d 1058.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. A11) was entered on March 17, 1989. A petition

[1] "Pet. App." refers to the appendix to the petition in No. 89-171.

for rehearing was denied on June 1, 1989 (Pet. App. A12). The petition for a writ of certiorari in No. 89-171 was filed on July 31, 1989. The petition for a writ of certiorari in No. 89-5641 was not filed until September 21, 1989, and is out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioners were convicted of conspiracy to obstruct interstate commerce by extortion (Count 1), and the substantive offense of extortion (Count 2), both in violation of the Hobbs Act, 18 U.S.C. 1951. Both petitioners were sentenced to concurrent terms of 15 years' imprisonment. The court of appeals affirmed petitioners' conspiracy convictions but reversed their convictions on the substantive count.

1. The pertinent facts are summarized in the opinion of the court of appeals. Pet. App. A1-A3. In May 1986, Otto Jack, an attorney in Steubenville, Ohio, consulted petitioner DiCarlantonio, who was then the Steubenville city attorney, about a local fire ordinance and the placement of propane gas tanks within city limits. Jack represented Jody Glaub of Atlas Gas Company, a propane gas distributor. DiCarlantonio advised Jack that he would discuss the matter with petitioner Prayso, the local fire chief who previously had caused the removal of propane tanks belonging to Atlas Gas. *Id.* at A1-A2.

On May 12, Jack telephoned DiCarlantonio to inquire whether any progress had been made. DiCarlantonio suggested that Jack give money to Prayso. Although Jack resisted the idea, arrangements were made for Jack to meet with petitioners at DiCarlantonio's office the next day. At the May 13

meeting, petitioner Prayso spoke of the large profit to be made and shared through kickbacks from suppliers of propane; Jack protested that such an arrangement would be illegal. Another meeting was scheduled for the next day. Pet. App. A2.

Between the May 13 meeting and the May 14 meeting, Jack and Glaub notified the FBI and agreed to assist an FBI investigation. At the May 14 meeting Jack and Glaub agreed that Glaub would calculate the profits he could expect as a result of a change in the ordinance, and that petitioners would receive shares of the anticipated profits. On May 20, petitioners agreed to a $30,000 fee for working to change the ordinance. Immediately after the meeting, petitioners began lobbying local officials in an effort to persuade them to change the ordinance. Pet. App. A2.

Glaub received $30,000 in cash from the FBI with which to make the payment, and on May 28 he delivered the money to petitioners. Prayso was arrested the same day, and $15,000 in cash was found in his socks. DiCarlantonio was also arrested, with a briefcase in his possession. When the FBI agents questioned him about the briefcase, DiCarlantonio claimed that he had no key to open it. Upon being told that the briefcase had a combination lock, DiCarlantonio stated that the combination was 1-3-3, but he warned that the lock would stick. When the FBI agents opened the briefcase in DiCarlantonio's presence, they found $15,000 in cash inside. DiCarlantonio then exclaimed, "Oh, how did that get there?". Pet. App. A2-A3.

2. Following their first trial, petitioners were convicted on extortion charges, but their convictions were reversed. *United States* v. *DiCarlantonio*, 830 F 2d 194 (6th Cir. 1987) (Table). Before the second trial,

DiCarlantonio sought a severance on the ground that the government intended to introduce Prayso's post-arrest statements and that the statements incriminated him. In response, the government agreed to redact the post-arrest statements. The court denied a severance, but it directed counsel to request a bench conference before testimony regarding Prayso's statements was introduced to ensure that the necessary redactions were made. Pet. App. A17-A18.

At trial, two FBI agents testified about Prayso's post-arrest statements. Gov't C.A. Br. 26-31. In the government's rebuttal case, an FBI agent testified that the $30,000 was furnished by the FBI and that the FBI was an interstate operation. *Id.* at 21.

3. The court of appeals reversed petitioners' substantive Hobbs Act convictions, but affirmed their conspiracy convictions. The court reversed the substantive convictions on the ground that the use of FBI funds was inadequate to establish an effect on interstate commerce, as required by the Hobbs Act, and that the government had failed to prove that the extortion had an effect on the flow of propane gas in interstate commerce. Pet. App. A3-A5. The court sustained the conspiracy convictions, however, because "a conspiracy charge requires the government to prove only that the defendants' scheme would have affected commerce." *Id.* at A6. The court further found that "a reasonable jury clearly could have found that [petitioners] had conspired to extort money from Glaub and Atlas Gas, and that, if successful, this scheme would have affected commerce by depleting the assets of an enterprise in interstate commerce." *Id.* at A7.

The court also rejected DiCarlantonio's contention that the admission of Prayso's statements required

reversal under the principles of *Bruton* v. *United States*, 391 U.S. 123 (1968). Although concluding that the redaction did not appear to satisfy the standards established by this Court in *Richardson* v. *Marsh*, 481 U.S. 200 (1987), the court held that reversal was not required because petitioner's counsel had failed to challenge the redaction and because "in light of the strength of the evidence of [DiCarlantonio's] guilt, any error was harmless." Pet. App. A7-A8.

ARGUMENT

1. Petitioners contend (89-171 Pet. 4-7; 89-5641 Pet. 4-7) that the government amended the conspiracy charge by adducing evidence that provided the jury with a new theory of how interstate commerce was affected. An indictment is constructively amended when the court permits a new basis for conviction other than that which appears in the indictment. *United States* v. *Miller*, 471 U.S. 130, 138 (1985); *Stirone* v. *United States*, 361 U.S. 212, 215-216 (1960). According to petitioners, the government constructively amended the indictment by eliciting testimony, in its rebuttal case, that the FBI was an interstate operation and that the payment of $30,000 in FBI funds to petitioners depleted or diminished the funds available to the FBI for a period of time.

As the court of appeals noted (Pet. App. A6), proof of an actual effect upon interstate commerce is an element of a substantive Hobbs Act violation, but not of a Hobbs Act conspiracy. See *United States* v. *Jannotti*, 673 F.2d 578, 590-594 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982). The gravamen of the Hobbs Act conspiracy is an agreement that "would have affected commerce," not an actual effect

on commerce itself. Pet. App. A6. The testimony about the fact that the funds were actually FBI funds (and that the FBI was an interstate operation) did not relate to the agreement between petitioners charged in Count 1. *Id.* at A13-A16. There was no suggestion at trial that petitioners knew that the funds were FBI funds, or that their illegal agreement encompassed a plan to obtain FBI assets. Although the source of the funds was material to the substantive count,[2] it was the contemplated source of funds from petitioners' perspective that was pertinent to the conspiracy charge. Proof about the eventual source of the funds, which was different from that envisioned by the conspirators, thus did not amend the indictment with respect to the conspiracy charge.[3]

2. Petitioner DiCarlantonio claims (89-171 Pet. 7-13) that the introduction of petitioner Prayso's post-arrest statements, through the testimony of FBI agents, violated his rights under the Confrontation Clause of the Sixth Amendment, as set forth in *Bruton* v. *United States*, 391 U.S. 123 (1968), and *Cruz* v. *New York*, 481 U.S. 186 (1987). That violation, he contends, requires that his conviction be reversed. The court of appeals found merit in the Confrontation Clause argument, Pet. App. A7-A8, but it

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[2] With respect to the substantive count, the court of appeals concluded that petitioners' objection to the testimony regarding the interstate character of the FBI was moot. Pet. App. A5 n.2.

[3] None of the decisions relied on by petitioners (see 89-171 Pet. 4-7; 89-5461 Pet. 4-7) involved a claim that a conspiracy charge was constructively amended by proof relating only to a jurisdictional element of a substantive charge and concerning matters not known or contemplated by defendants at the time of their illegal agreement.

concluded that reversal was not required because DiCarlantonio did not challenge the introduction of the testimony at trial and because any violation was harmless. *Id.* at A8.

The court of appeals was correct in upholding DiCarlantonio's conviction. DiCarlantonio did not object to the pertinent portions of the FBI agents' testimony at trial. He did not object to the redacted statements before their introduction, as the district court's order contemplated, Pet. App. A8, and with respect to the most explicit reference to DiCarlantonio (see 89-171 Pet. 8), his counsel specifically stated that the proposed testimony was not improper. See Gov't C.A. Br. 27.[4]

In the absence of a contemporaneous objection, a party must establish "plain error." Fed. R. Crim. P. 52(b). "[T]he plain error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *United States*

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[4] DiCarlantonio bases his Sixth Amendment claim on four statements by Prayso: (1) his statement to the FBI, "what are you doing here?" (89-171 Pet. 8); (2) his description of a meeting attended by Jack, Glaub, and DiCarlantonio (*ibid.*); (3) his description of the payoff in DiCarlantonio's office (*id.* at 8-9); and (4) his explanation for having $15,000 in his socks (*id.* at 9-10). As the government explained in its court of appeals brief (at 26-31), DiCarlantonio objected only to the first and fourth statements. Neither of those statements was hearsay; thus both would have been fully admissible against DiCarlantonio even if he had made a Confrontation Clause objection to their admission against him. The first statement was not an assertion at all, and the fourth was not introduced for its truth, but was introduced merely to show that it was made, so that it could later be shown to be false. See Fed. R. Evid. 801(a) and (c); *Anderson* v. *United States*, 417 U.S. 211, 220 (1974). In any event, neither the first nor the fourth statement incriminated petitioner.

v. *Young*, 470 U.S. 1, 15 (1985) (quoting *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982)).[5] The admission of the FBI agents' testimony did not result in a miscarriage of justice. As the court of appeals determined, "in light of the strength of the evidence of [DiCarlantonio's] guilt, any error was harmless." Pet. App. A8. The evidence in the record fully supported this determination and, in any event, that fact-specific ruling does not warrant further review.[6]

3. Petitioners contend (89-171 Pet. 13-17; 89-5641 Pet. 7-10) that although their offenses were committed before November 1, 1987, the effective date of the current sentencing guidelines, they were entitled to be sentenced under the guidelines. Petitioners maintain that their second trial, including the sentencing, occurred after November 1, 1987; that nothing in the governing statute or guidelines prohibits application of the guidelines to sentences imposed after November 1, 1987, for conduct occurring before that date; and that there is no constitutional barrier to applying the guidelines retroactively, because to do so would not increase petitioners' punishment.

Petitioners' claim is contrary to the explicit terms of the governing statute. The sentencing guidelines became effective on November 1, 1987. Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728 (amending the Sentencing Re-

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[5] DiCarlantonio apparently recognizes that his claim must be evaluated under a "plain error" standard. See 89-171 Pet. 13.

[6] It is well established that *Bruton* violations are subject to harmless error analysis. See *Schneble* v. *Florida*, 405 U.S. 427, 430 (1972); *Harrington* v. *California*, 395 U.S. 250, 254 (1969).

form Act of 1984, Pub. L. No. 98-473, § 235, 98 Stat. 2031). On December 7, 1987, as part of the Sentencing Act of 1987, Congress specified that the sentencing guideline provisions "shall apply only to offenses committed after the taking effect of" the Sentencing Reform Act of 1984. Pub. L. No. 100-182, § 2(a), 101 Stat. 1266. In light of that specific statute, petitioners were not entitled to have their sentences evaluated under sentencing guidelines that took effect after their crimes were committed.[7]

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[7] See *Gallardo* v. *Quinlan*, 874 F.2d 186, 188 (3d Cir. 1989); *United States* v. *Watson*, 868 F.2d 157, 158 (5th Cir. 1989); *United States* v. *Stewart*, 865 F.2d 115, 117-118 (7th Cir. 1988); *United States* v. *Argitakos*, 862 F.2d 423, 424-425 (2d Cir. 1988); *United States* v. *Burgess*, 858 F.2d 1512, 1513-1514 (11th Cir. 1988); *United States* v. *Rewald*, 835 F.2d 215, 216 (9th Cir. 1987). In *United States* v. *Stewart*, *supra*, the Seventh Circuit also pointed out that both the Senate Report accompanying the Sentencing Reform Act of 1984 and the general savings provision of 1 U.S.C. 109 further support the conclusion that the new sentencing statute does not apply to conduct committed before its effective date. 865 F.2d at 116, 118.

Petitioners assert (89-171 Pet. 17; 89-5641 Pet. 10), without elaboration, that failure to apply the sentencing guidelines in their cases would violate due process and the ex post facto prohibition. To the extent that petitioners are suggesting that, between November 1, 1987, the effective date of the sentencing guidelines, and December 7, 1987, the effective date of the Sentencing Act of 1987, they had a right to be sentenced under the new sentencing guidelines, and that their constitutional claims must be judged accordingly, they misread the statute that was in effect before the December 7 clarification. See *United States* v. *Stewart*, *supra*.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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